Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Application by Verizon Maryland Inc., Verizon Washington D.C. Inc., and Verizon West Virginia Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia	)	WC Docket No. 02-384

REPLY COMMENTS OF AT&T CORP.

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark C. Rosenblum
Lawrence J. Lafaro
James J.R. Talbot
AT&T CORP.
Room 3A229
900 Rt. 202/206 North
Bedminster, NJ 07921
(908) 532-1847

David M. Levy
Richard E. Young
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

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TABLE OF CONTENTS

FCC ORDERS CITED

SHORT CITE	**FULL CITE**
KS/OK 271 Order	Memorandum Opinion and Order, *Joint Application of SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd. 6237 (2001)
Local Competition Order	First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996), *aff'd in part and vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999), on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd*, *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646, 1678 (2002)
Massachusetts 271 Order	Memorandum Opinion and Order, *Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Massachusetts*, 16 FCC Rcd. 8988 (2001)
Michigan 271 Order	Memorandum Opinion and Order, *Application of Ameritech Michigan, Inc., Pursuant to Section 271 For Authorization to Provide In-Region, InterLATA Services in Michigan*, 122 FCC Rcd. 20543 (1997)
PA 271 Order	Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419 (2001)
Qwest Nine-State 271 Order	Memorandum Opinion and Order, *Application of BelllSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana,* 13 FCC Rcd. 20599 (1999)
Second Louisiana 271 Order	Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419 (2001)

UNE Remand Order	Third Report And Order And Further Notice Of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696 (1999)
Vermont 271 Order	*Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Vermont*, CC Docket No. 02-7 (rel. April 17, 2002)
Virginia 271 Order	Memorandum Opinion and Order, *Application of Verizon Virginia, Inc. For Authorization to Provide In-Region, InterLATA Services in Virginia*, CC Docket No. 02-214 (2002)
Virginia Arbitration Non-Cost Order	*Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 *et al*. (rel. July 17, 2002)

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the joint application of Verizon for authorization to provide in-region, interLATA services in Maryland, Washington, D.C., and West Virginia.

SUMMARY

The initial comments of other parties, and the state commission consultative reports, confirm that Verizon's 271 application for Maryland, West Virginia and the District of Columbia suffers from both non-pricing and pricing violations of the 271 checklist, each of which is sufficient to warrant rejection of the application. These reply comments are organized as follows:

Part I describes the further evidence that Verizon has failed to meet its interconnection obligations under Item 1 of the checklist. Verizon's "GRIPs" policy, which only allows CLECs to interconnect at either a Verizon tandem switch or an end-office switch, violates the requirement of Section 251 that CLECs be permitted to interconnect with Verizon's network at any technically feasible point. Moreover, in violation of Section 251(c)(3)'s requirement that Verizon offer interconnection on terms and conditions that are just and reasonable, Verizon fails to actively communicate the availability of returned (and vacant) collocation space to CLECs, and fails to credit CLECs who return such space with amounts sufficient to reflect the unused economic life of the space.

Part II summarizes the further evidence that Verizon has failed to provide wholesale bills to CLECs that are auditable, in violation of its OSS obligations under Item 2 of the checklist.

Part III provides a further showing that Verizon's "no build/no facilities policy" – under which Verizon rejects orders for high-capacity loops when "construction" (as Verizon broadly defines that term) is required – denies CLECs nondiscriminatory access to unbundled high-capacity loops, in violation of Items 2 and 4 of the checklist. The evidence submitted by individual CLECs is underscored by the report released yesterday by the Division of Communications of the Virginia State Corporation Commission. The report confirms that Verizon's policy is both discriminatory and substantially anticompetitive.

Part IV further demonstrates that Verizon does not provide dark fiber or EELs on just and reasonable terms, in violation of its obligations under Items 2 and 4 of the checklist.

Part V summarizes the further evidence that Verizon does not provide nondiscriminatory access to directory listings.

Part VI demonstrates the failure of Verizon's UNE prices to comply with TELRIC or to benchmark with New York rates. Verizon's recent maneuvers in the District of Columbia to avoid filing the rate reductions ordered by the PSC there, and the recent staff report of the Virginia State Corporation Commission concerning the cost implications of Verizon's recently adopted "no-build" policy, further underscore the unreasonableness of the existing rates.

Part VII describes the additional evidence—and the recent conduct of Verizon itself—demonstrating the failure of Verizon's performance assurance plans ("PAPs") in the three jurisdictions to assure Verizon's compliance with its checklist obligations after its Application has been approved.

I. VERIZON DOES NOT MEET ITS INTERCONNECTION OBLIGATIONS UNDER CHECKLIST ITEM 1.

The comments demonstrate that Verizon has failed to meet its interconnection obligations under Item 1 of the competitive checklist in two significant respects. First, contrary to the requirement of Section 251 that CLECs be permitted to interconnect with Verizon's network at any technically feasible point, Verizon – under the guise of its "GRIPs" policy – is effectively requiring CLECs to interconnect at either a Verizon tandem or end office serving the called party. Second, Verizon fails to maintain adequate processes for crediting CLECs who return collocated space, and to take reasonable steps to promote the use of returned space.

A. The Comments Confirm That Verizon's "GRIPs" Policy Violates Its Obligations Under Section 251(c)(2), and Checklist Item 1, To Provide Interconnection At Any Technically Feasible Point and On Rates, Terms, and Conditions That Are Just, Reasonable, and Nondiscriminatory.

The comments confirm that Verizon's GRIPs policy is flatly inconsistent with the requirements of Section 251(c)(2), and the Commission's regulations, that Verizon provide interconnection "at any technically feasible point within [its] network" and "on rates, terms, and conditions that are just, reasonable and nondiscriminatory." *See* 47 U.S.C. § 251(c)(2); AT&T at 6-12; Fibernet at 6-11; Starpower at 4-16. By effectively dictating that CLECs interconnect at either a Verizon tandem switch or an end-office switch serving a Verizon customer, Verizon violates the CLECs' right under Section 251 to select the point of interconnection ("POI"), without financial penalty, as long as the POI is technically feasible. AT&T at 6-7; Fibernet at 6-7; Starpower at 4-5.

By denying the CLECs their right to choose the POI, the GRIPs policy has the effect of substantially increasing a CLEC's costs (and decreasing Verizon's costs), in contravention of Section 251(c)(2)'s clear mandate that each carrier (ILEC and CLEC) be responsible for its own origination costs. AT&T at 6-7; Fibernet at 6-7; Starpower at 4-5. Under the GRIPs policy, the carriers' financial responsibilities with respect to reciprocal compensation begin and end at Verizon's self-created "interconnection point" ("IP"), rather than at the physical POI. As a result, CLECs are required to bear originating costs that Section 251(c)(2) requires Verizon to incur. *Id.* Stated otherwise, Verizon's policy gives Verizon "a free ride over the point where the networks are physically interconnected," while allowing Verizon to demand compensation from CLECs for transport of CLEC-originated calls. Fibernet at 6-7.

The GRIPs policy thus "represents a distortion of what the law requires at the physical points of interconnection and the use of each other's network." Fibernet at 7. The Commission recognized this fact in the *Virginia Arbitration Order*, where it rejected the policy because of its incompatibility with Section 251(c)(2) and the Commission's rules. AT&T at 8-9.

Rather than comply with the Commission's ruling, however, Verizon still seeks to enforce the GRIPS policy at every available opportunity. Thus, although Verizon asserts that its Model Interconnection Agreements in the three jurisdictions at issue here do not incorporate the GRIPs policy, the comments show that the interconnection provisions of these agreements implement the policy in all but name. AT&T at 10-11; Fibernet at 9-10; 8-10. The Maryland PSC has expressly held that those provisions implement the GRIPs policy, and should be removed from the Agreement. AT&T at 11. Meanwhile, Verizon's own affiliate has advised US LEC that, under these provisions, a CLEC which does not locate its POI at the Verizon tandem will be required to pay charges to Verizon for transporting the traffic from the CLEC's POI to Verizon's tandem. Starpower at 9-10.[1] Furthermore, notwithstanding its reliance on the Model Interconnection Agreements in this proceeding, Verizon has proposed in a pending arbitration with US LEC to include the GRIPs policy in the parties' interconnection agreement. Starpower at 9 & 11. This is negotiation in bad faith—and clearly aimed at creating barriers to competitive entry.

[1] Even if the interconnection provisions of the Model Interconnection Agreements did not follow the GRIPs policy, CLECs should not be required to bargain with Verizon in order to ensure that their individual agreements with Verizon will include interconnection provisions that are consistent with Section 251(c)(2). AT&T at 11-12.

The comments also demonstrate that, even if Verizon has at least one interconnection agreement that does not follow the GRIPs policy in each of the three jurisdictions, that is insufficient to satisfy the checklist. In the first place, Verizon violates the nondiscrimination requirement of Section 251(c)(2) by enforcing the policy against CLECs that lack such non-GRIPs provisions in their agreements. AT&T at 9. Second, agreements that Verizon cites in support of its position (including its agreement with AT&T in West Virginia) make the same artificial distinction between POIs and IPs as the GRIPs policy. *See* Starpower at 12-15; AT&T at 9 n.3. Verizon itself has conceded that its agreement with WorldCom in West Virginia – which AT&T and Fibernet separately "opted into" – established "a similar concept in some respects" to GRIPs. Starpower at 14.

In short, "no matter how much Verizon attempts to convey to this Commission that it is offering alternatives to GRIPs and VGRIPs, the reality is that CLECs are being forced to arbitrate to avoid Verizon's unlawful GRIPs and VGRIPs policies." Starpower at 16. The Commission cannot ignore this reality, because the issues raised by GRIPs "go to the very heart of Verizon's compliance with the explicit requirements of the Act and the [Commission's] regulations implementing these statutory directives." Fibernet at 7. The harm to competition is obvious. By requiring CLECs to engage in arbitration against Verizon's bad faith negotiating positions, Verizon effectively raises the cost of entry for many CLECs—particularly small facilities-based CLECs—to prohibitive levels. For these reasons, the Commission should find that the GRIPs policy violates Item 1 of the checklist. Absent such a finding, Verizon will simply continue its current disregard of the Act, the Commission's regulations, and the *Virginia Arbitration Order*.

B. Verizon's Policies Regarding the Return of Collocated Space Violate Item 1 of the Checklist Because They Are Unjust and Unreasonable.

As described in AT&T's opening comments, Verizon's policies regarding the return of collocation space violate the requirement of Section 251(c)(2) that interconnection be provided on rates, terms, and conditions, that are just, reasonable, and nondiscriminatory. Specifically, despite the substantial number of collocation arrangements that CLECs are returning to Verizon, Verizon has failed to make commercially reasonable efforts to attract subsequent users of returned collocation space. As a result, only a small percentage of the returned space has been re-used, and Verizon has provided credits to CLECs for relatively few of the returned arrangements. Even when Verizon pays such credits, their amounts are unreasonably low, because Verizon has used an overly short amortization period to calculate them.

1. Verizon has failed to make commercially reasonable efforts to communicate to CLECs the availability of returned collocated space.

Despite its general recommendation that Verizon's Application be approved, the West Virginia PSC recognizes that Verizon has not made commercially reasonable efforts to communicate to CLECs the availability of returned collocated space. The PSC, noting that CLECs have returned 35—or nearly 45 percent—of the 79 collocation arrangements that Verizon provisioned in West Virginia through July 2002, finds that "Verizon West Virginia's practice of not posting any information regarding returned collocation space may explain why only five returned arrangements have been reused in the past three years." West Virginia PSC at 17-18. The PSC therefore has ordered Verizon to post on its website "the central offices in which collocation arrangements have been returned, and to timely update that information." *Id.* at 18.[2] The PSC determined

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[2]Under the West Virginia PSC's requirement, Verizon must post information on its

that requiring such posting "is reasonable, does not overly burden Verizon's administration, and *provides information that CLECs may consider useful in keeping their costs of collocating down while potentially expediting the collocation process*." *Id.* (emphasis added). As the PSC noted, the posting requirement is consistent with the Commission's *Local Competition Order*, which held "that ILECs 'have a duty to make available to requesting carriers general information indicating the location and technical characteristics of [their] network facilities' because that information is in their possession, not the CLECs."[3]

As the West Virginia PSC recognized, Verizon's failure to make commercially reasonable efforts to communicate the availability of returned collocated space to CLECs impedes their ability to compete in the local exchange market. Verizon's aggressive passivity imposes needless costs on the vacating CLEC (which must continue to incur monthly depreciation charges for the vacated space until it is re-used by another CLEC or by Verizon), while depriving other CLECs of the benefit of the lower rates that would be available to them from using the vacated space. AT&T at 16. For these reasons, Verizon's current policies regarding collocation are unjust and unreasonable, in violation of both Section 251(c)(2) and Item 1 of the checklist.

2. Verizon's Policies Regarding Returned Collocation Space Also Fail To Satisfy Checklist Item 1.

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website regarding a returned collocation arrangement within 10 days of its return, and to timely update that information. West Virginia PSC at 18, 124, 137.

[3] West Virginia PSC at 18 (quoting *Local Competition Order* ¶ 205). As the West Virginia PSC stated, although the Commission made the quoted statement in its discussion of dark fiber, its observation is "equally relevant to collocation." *Id.*

Verizon's collocation policies are unreasonable in a second and independent respect: when collocation space is returned and released, Verizon does not properly credit the accounts of either the vacating CLEC or the incoming CLEC.

As Verizon's federal and intrastate tariffs recognize, a CLEC that vacates collocation space is entitled to a credit for the unamortized portion of the non-recurring space and facilities conditioning charge when the collocation space is reused by either another CLEC or Verizon itself.[4] Conversely, a CLEC (or collocator) that later occupies the vacated space is required to pay only the remainder of the unamortized portion of these non-recurring conditioning charges.[5] The obvious function of this scheme is to properly allocate the entry and exit costs among the various parties ensuring that no CLEC bears costs that are not properly attributable to that CLEC (or to Verizon, when it is the subsequent user of the space), and to bar double recovery of these space construction charges.

As AT&T noted in its initial comments, however, it has recently come to light that Verizon is calculating refund credits for vacated collocation facilities on the basis of an assumed 12-year economic life, not the 30-year period published in Verizon's own tariffs.[6] Verizon defends its newly truncated amortization period on the theory that a 12-

[4] F.C.C. Tariff 1 § 19.3(p).

[5] F.C.C. Tariff 1 § 19.3(p).

[6] AT&T 14-15; *accord*, Maryland 271 Proceeding, Tr. 534; ex parte letter from Ann D. Berkowitz to Marlene H. Dortch, filed in WC Docket Nos. 02-384 and 02-237, (Jan. 22, 2003). Verizon failed to acknowledge its use of the 12-year amortization life until recently, when AT&T discovered it during refund negotiations. Until then, Verizon merely disclosed the total amount of a refund, without revealing any of the factors it used to calculate them.

year depreciation period is consistent with the depreciation lives prescribed by this Commission.[7] This excuse is wholly without substance.

First, whether Verizon *could* reasonably adopt a 12-year depreciation period in its tariffs is irrelevant. Verizon's tariff language is unambiguous: "The credit to the initial Collocator will be the initial charge less 1/360th for each month elapsed until occupancy occurs with the new incoming Collocator." Verizon Tariff F.C.C. No. 1 at 19-9 (Effective September 26, 2001). This language clearly indicates a 30 year depreciation life for collocation space. Even Verizon's own witness has admitted that the provisions of the FCC tariff regarding return of collocated space "imply that it is a 30-year period." Maryland PSC 271 Proceeding, Tr. 549-550 (Maguire) (Application, App. B-MD, Vol. 8, Tab 34).

The CLEC compliance auditor hired by Verizon, KPMG, likewise found in an independent review of Verizon's tariffs and procedures that Verizon applies a 30-year period for depreciation of collocation space. The KPMG OSS evaluation project, submitted by Verizon in its Virginia 271 application—and submitted as evidence by Verizon in all three state proceedings relevant to the current application—demonstrates an understanding that collocation space will be depreciated over a thirty year lifetime. Indeed, the final report expressly states that "The credit will amount to the undepreciated value of the assets that were vacated *over a thirty-year period*. Thus the new CLEC will obtain collocation space, less the depreciated value of assets that were vacated by the initial CLEC." Verizon Virginia, Inc. OSS Evaluation Project, KPMG Final Report at 209 (emphasis added) (cited in AT&T 15 n. 15). It is telling that Verizon has not

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[7] *See id*. at 2 (citing *Simplification of the Depreciation Prescription Process,* 10 FCC Rcd. 8442 (1995), and *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd. 242 (1999)).

challenged this understanding in any of the state 271 proceedings in which it submitted the KPMG report as evidence of § 271 compliance.[8]

As long as its collocation tariffs remain in effect, Verizon's failure to calculate credits for unused space on the basis of a 30-year economic life thus violates the filed rate doctrine, and hence is illegal. Hence, the Commission need not reach the issue of what the proper forward-looking depreciation lives might be for collocation.

In any event, a 12-year economic life for unused collocation space is clearly unreasonable, because it is far shorter than the true economic life of the assets. The 12-year depreciation life prescribed by the Commission[9] applies to digital circuit *equipment*—i.e., high tech electronic equipment placed inside the collocation space.[10] The collocation assets subject to refund credits, however, are relatively low-tech landlord/tenant items such as the construction, partitioning and preparation of building space and associated building systems such as air conditioning, lighting, flooring, asbestos removal, climate controls, and other construction—all of which are likely to have far longer economic lives for the ILEC than does digital circuit equipment.

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[8] The Virginia SCC held three days of hearings on the draft KPMG report. Virginia SCC Case No. PUC 00035 (currently numbered PUC 2000-00035), hearings on March 18-20, 2000. Likewise, a panel of KPMG auditors testified as live witnesses under oath in the Maryland 271 hearings. Maryland P.S.C. Case No. 8921 Hearing Tr. at 1279-1393 (Oct. 31, 2002). Moreover, Verizon submitted the final KPMG report in the Maryland 271 docket, and submitted both the report and the related Maryland hearing transcript in the West Virginia and District of Columbia 271 dockets. At no point in any of those proceedings did Verizon take issue with KPMG's conclusion that the relevant asset life was 30 years, not 12.

[9] Or, to be more precise, the 11-to-13 year depreciation life range.

[10] *See Simplification of the Depreciation Prescription Process*, 10 FCC Rcd. 8442 (1995).

The barrier to competitive entry created by use of an unrealistically short economic life should be obvious. An overly short life, by decreasing the size of the potential refund available to CLEC upon abandonment of collocation space, increases the share of the entry cost that becomes sunk immediately upon entry. Likewise, when Verizon (or an affiliate such as the former VADI) is the subsequent owner of the collocation space in a Verizon central office, the company reaps a windfall from the improperly accelerated depreciation extracted from its CLEC competitors.

II. VERIZON HAS FAILED TO PROVIDE NONDISCRIMINATORY ACCESS TO BILLING FUNCTIONS.

Verizon must "demonstrate that it can produce a readable, auditable, and accurate wholesale bill to satisfy its nondiscrimination requirements under checklist item 2." *See, e.g. Qwest Nine-State 271 Order* ¶ 122; *Pennsylvania 271 Order* ¶ 22. The comments, however, show that Verizon has failed to bear its burden.

As AT&T has previously shown, for example, Verizon's electronic wholesale bills are not fully auditable in Maryland, the District of Columbia, and West Virginia, because CLECs are required to perform an *ad hoc* manual process of cross-referencing in order to identify errors or changes in the monthly recurring charges for collocation in the customer service record.[11] Although Verizon recently announced its intention to correct this problem, it has not yet done so.[12] This effectively leaves CLECs unable to fully audit

[11] As AT&T has previously explained, CLECs are unable to fully audit BOS/BDT bills in Maryland, West Virginia, and the District of Columbia because they do not contain a "CLLI" code, which is the industry-standard identifier that would enable CLECs readily to identify the collocation charges on the electronic bill. *See* AT&T at 17-19. By contrast, the electronic bills that Verizon issues in the former "Bell Atlantic North" region contain CLLI codes. *Id.* at 18.

[12] In response to CLEC concerns about the absence of CLLI codes on bills in the three jurisdictions at issue here, Verizon recently advised the CLECs that it would implement a change in its systems during February 2003 to include CLLI codes on BOS/BDT bills in

their wholesale bills. As Fibernet states, auditing Verizon's paper bills is "nothing short of impossible," due to their sheer bulk. Fibernet at 38-39. Verizon's assertion of *future* promissory compliance is obviously unverifiable.

III. VERIZON DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO UNBUNDLED HIGH-CAPACITY LOOPS.

The comments demonstrate that Verizon discriminates against CLECs in provisioning "high-capacity" loops (including DS1 and DS3 loops). *See* AT&T at 19-27; Fibernet at 11-16; D.C. Office of People's Counsel at 14-17. Verizon enforces against CLECs (but not against itself) a "no build/no facilities" policy under which any order by a CLEC for DS1 or DS3 loops will be rejected if provisioning of the order will require "additional construction" – a term that Verizon has expansively defined to include many routine or minor provisioning tasks.[13]

The comments further establish that, as a result of Verizon's policy, a substantial percentage of CLEC orders are rejected. In Maryland, Verizon rejected more than 20 percent of the UNE DS1 orders placed by Allegiance in the first five months of 2002, and 48 percent of Allegiance's DS-1 orders in September, on the ground that no facilities were available. AT&T at 20. In the District of Columbia, Verizon's policy has resulted in rejection of "a significant number of orders," including 30 to 40 percent of the orders

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every State in its region. (Verizon has classified this change as a Type 1, or emergency, change.) Verizon advised CLECs of the change after AT&T filed its opening comments in this proceeding on January 9, 2003. However, Verizon has not yet implemented the change, and its commitment therefore represents a promise of future performance that is irrelevant to the issue of whether Verizon *currently* complies with the checklist..

[13] AT&T at 20; Fibernet at 13, 15; *accord*, Virginia SCC Case No. PUC-2002-00088, *Petition of Cavalier Telephone, LLC for Injunction Against Verizon Virginia Inc. for Violations of Interconnection Agreement and for Expedited Relief to Order Verizon to Provision Unbundled Network Elements in Accordance with the Telecommunications Act of 1996*, Report of Division of Communications ("Virginia SCC Staff Report") (reproduced as Attachment B hereto) at 22-24, 43.

of Allegiance, which testified that such rejections were "killing" its ability to provide a high-speed integrated voice and data product to its customers. D.C. Office of People's Counsel at 15; *see also* AT&T at 20. In West Virginia, the "no build/no facilities" policy caused the rejection of at least 50 percent of Fibernet's orders, and 35 percent of StratusWave's orders, for DS-1 loops. Fibernet at 12; AT&T at 20-21. Moreover, the rejections, whether by design or otherwise, clearly have a disproportionate impact on facilities-based CLECs that seek to compete for small business customers.

By themselves, these high rejection rates would be cause for concern: although CLECs currently order fewer DS-1 loops from Verizon in states such as West Virginia, DS-1 and DS-3 loops are a linchpin of facilities-based market entry in those states. Loops of this kind are often channelized into 24 or 672 channels, and further voice traffic is customarily concentrated at 4:1 or 8:1 before transmission. Hence, by failing to provision a single high-capacity loop, Verizon can effectively deny access to the equivalent of as many as 5,376 voice-grade loops.[14] If Verizon's lacks the facilities to provision high-capacity loops for CLECs at the present time, it certainly will be unable—or more accurately, simply unwilling—to provision such loops, and the thousands of equivalent DS0 loops—adequately in the future, as competition increases. Fibernet at 12.

More importantly, the "no build/no facilities" policy, with the high rejection rates that result, is discriminatory. As the comments demonstrate, Verizon does not reject its own *retail* orders for high-capacity loops on the ground that "construction" is required; instead, Verizon routinely undertakes whatever construction is necessary to provision these orders. AT&T at 20; Fibernet at 13, 15; D.C. Office of People's Counsel at 14-15;

[14] A DS-3 is equivalent to 672 DS-0s. At an 8:1 concentration ratio, a DS-3 can carry 5376 DS-0s. A DS-1 likewise can carry 192 DS-0s at an 8:1 concentration ratio.

Virginia SCC Staff Report (Attachment B, *infra*) at 24-25. A policy that implements retail orders even when "construction" is necessary, while rejecting CLEC orders for the same loops on the ground that "no facilities" are currently available, is "pure and simple discrimination." Fibernet at 16.[15]

The "no build/no facilities" policy is a major barrier to local competition, because it imposes additional procedures and costs on the CLECs that Verizon's retail operations do not experience. *See Maryland PSC December 16 Letter* at 3; AT&T at 19-21; *accord*, Virginia SCC Staff Report (Attachment B, *infra*) at 39-43. When Verizon rejects an order for an unbundled DS1 or DS3 loop on the pretext that "no facilities" are available, the only viable alternative open to the CLEC is to order a special access circuit from Verizon. Recurring special access charges can be as much as five times the recurring cost of a DS-1 loop plus cross-connect. The CLEC can obtain the lower rate for a DS-1 loop only if it submits an order to terminate the special access facility and then orders a UNE or combination of UNEs to replace it. This cumbersome multiple-order process simply delays the installation of service to the CLEC's customer, creates the likelihood that the CLEC's customer will cancel the order, and increases the CLEC's costs. *See* AT&T at 22-23; Fibernet at 14; D.C. Office of People's Counsel at 15-17; *Maryland PSC December 16 Letter* at 3.

[15] The D.C. PSC found that Verizon's policy did not violate the checklist because Verizon's obligations to its retail customers arise from separate statutory obligations, and separate pricing regimes, from its obligations to the CLECs. D.C. PSC at 35. Such reasoning is illogical. When Congress enacted the 1996 Act, it was undoubtedly aware that ILECs provided services to their retail customers under a different regulatory regime. Congress nonetheless enacted the nondiscrimination requirement of Section 251, which plainly prohibits ILECs from discriminating against CLECs in favor of their own retail operations. If ILECs such as Verizon were allowed to practice discrimination against CLECs on the ground that their retail operations stemmed from a different regulatory regime, the nondiscrimination provisions of the Act would be rendered virtually meaningless.

Verizon's discriminatory policy is plainly designed to impede competition. Verizon has acknowledged that its policy is not based on technical impediments, but is simply a policy decision. AT&T at 23. Indeed, Verizon has refused to change its policy even when the CLEC offered to pay the cost of "constructing" the repeater shelf or the apparatus doubler case. Fibernet at 13.

Verizon's "no build/no facilities" policy is also inconsistent with the Commission's accounting rules. Verizon's apparent theory is that an incumbent should not be required to provide additional capacity when doing so would require Verizon to incur major additional capital expenditures—i.e., create a new network for the sake of unbundling it. As the Commission's accounting rules recognize, however, the kinds of plant rearrangement at issue are ordinary expenses, not capital projects: "Plant Specific Operations Expense Accounts shall include the cost of . . . replacing items of plant other than retirement units, rearranging and changing the location of plant not retired . . ." 47 C.F.R. § 32.5999(b)(3). If Verizon were to capitalize the cost of rearranging existing facilities, such as opening a cable sheath to splice existing cable pairs into an existing apparatus case, Verizon's accounts would be materially misleading under the securities laws.[16] Verizon cannot claim here that provisioning activities which it books as expenses are capital construction.

The PSCs of Maryland and West Virginia have recognized the discriminatory and anticompetitive nature of Verizon's "no build/no facilities" policy. The Maryland PSC has required that, when Verizon rejects a CLEC's order due to "no facilities," Verizon must *automatically* convert the order into a special access order and then *automatically*

[16] As discussed below (Section VI.B, *infra*), the "no build/no facilities" policy is also inconsistent with TELRIC principles.

convert the newly-built special access facility back to a UNE after the minimum special access period under the tariff has elapsed.[17] The West Virginia PSC, although believing itself bound by prior rulings of this Commission, states that it is "sufficiently concerned by the issues presented . . . regarding the 'no facilities' policy" that it has initiated an investigation of those issues.[18]

The Commission has previously recognized the "potential" discriminatory nature of Verizon's "no build/no facilities" policy, but has declined to declare it unlawful based on the evidence of record at that time. *See, e.g., Virginia 271 Order* ¶ 143. The evidence now overwhelmingly demonstrates that the policy is discriminatory and anticompetitive, and thus a violation of Items 2 and 4 of the checklist. AT&T at 26-27; Fibernet at 15-16.

IV. THE COMMENTS DEMONSTRATE THAT VERIZON FAILS TO PROVIDE DARK FIBER OR EELS IN COMPLIANCE WITH THE CHECKLIST.

As part of its burden of establishing compliance with Item 2 of the checklist, Verizon must establish that it has satisfied the requirement of Section 251(c)(3), and Item 2 of the checklist, that an ILEC provide nondiscriminatory access to UNEs "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *See* 47 U.S.C. §§ 251(c)(3), 271(c) (2)(B)(ii). That obligation clearly extends to the provisioning of dark

[17] *See* AT&T at 24-25. Verizon's Application does not commit to fully implement beyond Maryland the process ordered by the Maryland PSC. AT&T at 25 & n.28. Instead, with respect to the District of Columbia and West Virginia, the Application states only that Verizon will implement the first stage of the automatic conversion process ordered by the Maryland PSC – the conversion of the loop order into a special access order. *Id.*

[18] West Virginia PSC at 70-71. The West Virginia PSC's investigation will address: (1) the activities that Verizon has defined as "construction"; (2) how Verizon's rates for special access compare to the costs of such "construction"; (3) whether the PSC should adopt permanent performance measurements for special access; and (4) whether Verizon should be required to pay monetary penalties for failure to meet any such performance measurements. *Id.* at 71, 128, 139.

fiber, which the Commission has determined to be a UNE. *See UNE Remand Order* ¶¶ 165, 174.

An ILEC also has the obligation to provide nondiscriminatory access to enhanced extended loops ("EELs"). Although the Commission has declined to deem the EEL as a separate and distinct UNE, the EEL is a combination that includes transport (interoffice facility, or "IOF") and loops, each of which is a UNE subject to the nondiscrimination requirements of Section 251(c)(3).[19] In addition, because EELs are a combination of UNEs, the ILEC must provide EELs consistent with its obligation to provide nondiscriminatory access to combinations of UNEs. *E.g., Kansas/Oklahoma 271 Order* ¶ 171 & n.486. Even leaving aside Verizon's obligations under Item 2 of the checklist, its performance with respect to EELs is subject to Items 4 and 5 of the checklist, which specifically address loops and transport, respectively.[20]

The comments, however, show that Verizon falls far short of meeting its checklist obligations with respect to dark fiber or to EELs.

[19] *See UNE Remand Order* ¶¶ 165, 321 (holding that loops and IOF are UNEs that incumbent LECs must provide on a nondiscriminatory basis).

[20] Item 4 of the checklist requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services." 47 U.S.C. § 271(c)(2)(B)(iv). As part of its showing that it complies with this item, Verizon must demonstrate that it is providing nondiscriminatory access to unbundled loops. *Qwest Nine-State 271 Order*, App. K ¶ 26. Item 5 of the checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C. § 271(c)(2)(B)(v). Under the Commission's rulings, this item requires a BOC to provide local transport as a UNE on a nondiscriminatory basis. *E.g.*, *Second Louisiana 271 Order* ¶ 201.

A. Dark Fiber

The comments confirm that Verizon has failed to meet its obligation under Item 2 of the checklist that it provide dark fiber on a nondiscriminatory basis and on terms that are just and reasonable. AT&T at 27-31; Core at 19-22; Fibernet at 23-26. Instead, the comments show that Verizon has frustrated the CLECs' attempts to use dark fiber.

First, Verizon has failed to implement methods and procedures to effectuate its obligations under the Commission's *Virginia Arbitration Order*. In addition, as the Maryland PSC found, Verizon still has not implemented in Maryland the procedure (mandated by the *Virginia Arbitration Order)* that allows CLECs to order dark fiber ten days after the CLEC requests a collocation arrangement or augment. AT&T at 28-29.[21]

The comments further demonstrate that, even if Verizon has included provisions in its Model Interconnection agreement which permit "parallel provisioning" of dark fiber with a collocation arrangement and incorporate the requirements of the *Virginia Arbitration Order*, that is insufficient to prove compliance with Item 2 of the checklist. The comments of the parties – including the D.C. PSC – agree that the Model Interconnection Agreement is not binding on any party, but simply represents the opening offer in the course of negotiations. *See* AT&T at 29; D.C. PSC at 44-45; Core at 20; Fibernet at 24-25. Thus, as the D.C. PSC states, "It is not clear that CLECs can secure the benefit of the changes to the Model Interconnection Agreement without being burdened with the need to address a potential host of other issues that Verizon would like to see included in new or amended interconnection agreements." D.C. PSC at 44-45.

[21] Verizon's Application promises that it will continue to offer parallel provisioning of dark fiber and collocation in compliance with the Maryland PSC's requirements, but makes no such commitment with respect to the District of Columbia or West Virginia. AT&T at 28-29.

Because of its concern regarding this and other issues regarding dark fiber, the D.C. PSC states in its consultative report that it is instituting an investigation "to determine whether improvements in Verizon DC's dark fiber offerings are necessary." *Id.* at 4, 44-45.[22] Finally, even leaving aside the question of the availability of the dark fiber provisions of the Model Interconnection Agreement to all CLECs, many of the provisions of that agreement appear to be unreasonable and burdensome.[23]

Second, the comments show that Verizon fails to provide CLECs with sufficient and timely information as to what fiber is available and where it can be found. AT&T at 30-31; Core at 19-20; Fibernet at 23-26. Instead, Verizon requires CLECs to specify with precision the exact fiber end points to identify available fiber, without giving them the information that they need to identify the exact route. *Id.* As a result of this lack of information, the process of ordering dark fiber is a "black hole," where the CLEC must often resort to "guesswork" and "go through fruitless searches for available fiber armed with inadequate information and terminating in frustration." *See* Fibernet at 23-26; AT&T at 30; Core at 19. This process is unreasonably burdensome on CLECs and an impediment to competition, because it undermines a CLEC's attempts to provision fiber

[22] In addition, one CLEC states that in its experience, Verizon's dark fiber amendment template is "vastly different from the dark fiber provisions of the Model ICA." Core at 20.

[23] As AT&T has previously described, for example, the parallel provisioning procedures of the Model Interconnection Agreement appear to require the CLEC to follow a cumbersome process involving the submission of multiple requests. AT&T at 29 n.33. In addition, as Core states, despite Verizon's professed willingness to provide serving wire maps and field surveys to CLECs, "both forms of information are larded down with numerous caveats and restrictions" in the Model Interconnection Agreement. Core at 20. To obtain either a wire center map or field survey, "CLECs must first 'negotiate' an interval, obtain a cost estimate, then wait" until Verizon prepares and provides the information. *Id.* *See also, e.g.,* Maryland Model Interconnection Agreement, Network Element Attachment, Sections 8.2.19.1, 8.2.19.2.

to a customer's building. AT&T at 30; Core at 19. Indeed, Fibernet states that it has "basically given up on even attempting to place dark fiber orders" with Verizon in West Virginia, because the prospects of successfully placing such orders with Verizon are so low.[24]

More fundamentally, Verizon's failure to provide comprehensive information regarding dark fiber to CLECs is discriminatory, because Verizon's retail network operations have access to the necessary information. AT&T at 30; Fibernet at 25. Verizon has no incentive to provide the information that CLECs need, because doing so "would allow CLECs to compete with [Verizon] on a level playing field." Fibernet at 26. That is why the Maryland PSC, in order to "remove a barrier to competition by improving access to UNEs and the quality of information available to CLECs," ordered Verizon to provide to CLECs, upon request, central office and all related termination points for all fiber facilities for any office or group of offices at which the CLEC is considering dark fiber. *See* AT&T at 30-31; *Maryland PSC December 16 Letter* at 5. Typical of its anticompetitive attitude, however, Verizon's Application promises only to provide this information in Maryland, without committing to do so in the District of Columbia and West Virginia. AT&T at 31.

Because it has failed to provide adequate information regarding the availability and location of dark fiber, Verizon has not shown that it provides UNEs on a just, reasonable, and nondiscriminatory basis, as required by Item 2 of the checklist. "Simply stated, to use dark fiber, competitive carriers must know where it is, and [Verizon's]

[24] *See* Fibernet at 24 & n.19 (stating that Verizon rejected all three of the orders that Fibernet placed for dark fiber, on the ground that no facilities were available).

current dark fiber ordering processes and procedures simply do not allow for that to occur." Fibernet at 25-26.

B. EELs

The comments establish that Verizon's procedures for the ordering of EELs are discriminatory and unreasonable, in violation of the checklist. When the interoffice facility ("IOF") and loop components of the EEL are of different speeds, Verizon requires that CLECs submit two separate orders (one for the IOF, and one for the loop) and assesses two order charges against the CLEC. Moreover, the CLEC must submit the orders sequentially, and await the completion of the IOF order before it can submit the order for the loop. By itself, this process simply delays the time before the EEL is fully operational.

Verizon, however, increases the burden and risk imposed on CLECs by charging for the IOF as soon as it has been turned up, even before the loop component has been ordered (much less provisioned). The CLEC is therefore required to incur stranded costs for the IOF until the loop has been provisioned – which could take as long as 15 days even if a loop is available. These stranded costs will be even greater if Verizon rejects the order on the ground that "construction" is required: rejecting the loop order(s) under the "no build" policy leaves the CLEC stuck with the billing for the IOF. AT&T at 32-33; Fibernet at 17-19.[25]

[25]Verizon, in fact, has already rejected EEL orders on the ground that no facilities are available. When Fibernet submitted orders for EELs after the date on which (according to Verizon) EELs could be ordered in West Virginia, the orders were rejected on the ground that EELs could not be ordered in that State. Although Verizon later informed Fibernet that the orders should not have been refused initially, Verizon was still rejecting them on the ground of "no facilities." Fibernet at 17.

If the CLEC needs to place the loop order as an access order, the CLEC must first convert the UNE IOF into an access IOF; only then can the CLEC submit the loop order as an access order. Moreover, because the minimum holding period for a DS-3 is twelve months, the CLEC would be forced to incur the higher DS-3 access costs for at least that long. Further, even if the CLEC eventually converts the EEL IOF and the then-subtending loops back to UNEs, the CLEC will face the same obstacle course when the next subtending loop order encounters a "no facilities" objection. As a result, the CLEC may pay substantial charges for the IOF before it can actually make use of the EEL (and receive any revenue from its customer). AT&T at 32-33; Fibernet at 19.

This "sequential ordering" procedure is both unreasonable and discriminatory. *Id.* Although Verizon uses EELs (or their functional equivalent) in its retail, resale and wholesale operations, it is not normally required to follow a sequential-ordering procedure in providing local exchange service. In any event, Verizon does not face the "stranded costs" and access conversion problems encountered by CLECs, since it does not charge itself for the EELs that it uses in its retail operations. *See* AT&T at 33. Finally, Verizon does not face the possibility that the stranded costs will be increased even further when "construction" is required to provision the loop. As stated *supra*, in contrast to the "no build/no facilities" policy that it enforces against CLECs, Verizon will proceed to perform any construction required to provision a loop ordered by its retail operations, rather than reject the order.

Verizon can offer no justification for its discriminatory "sequential ordering" policy. In Massachusetts and Rhode Island, Verizon already allows CLECs to order all of the components of the EEL simultaneously, and assesses charges for the EEL only when it has been completely provisioned. AT&T at 33-34. As long as Verizon fails to provide the same process in Maryland, West Virginia, and the District of Columbia, its Application cannot reasonably be found to be in compliance with the nondiscrimination requirements of the checklist.[26]

The PSCs in each of the three jurisdictions at issue here have recognized that Verizon's sequential-ordering procedure is unreasonable and anticompetitive. The Maryland PSC found that this procedure creates "unwarranted delay and additional costs." *Maryland PSC December 16 Letter* at 7. Because of the deficiencies in the process, the Maryland PSC ordered that – as a condition of its approval of the Application – Verizon adopt the simultaneous-ordering procedure currently used in Massachusetts, and to include such a procedure in its Model Interconnection Agreement. *Id.* Only three weeks ago the West Virginia PSC, after reviewing the evidence of the delays and costs caused by the sequential-ordering process, ordered that Verizon "use a 'coordinated' ordering process for these facilities and . . . file tariff sheets setting forth the coordinated EEL ordering process" by early February. West Virginia PSC at 71, 128, 137.

The District of Columbia PSC has expressed similar concerns about the sequential-ordering procedure. The PSC found that "it is improper for the CLECs to bear the financial burden for lags between the ordering of EELs and the provision of their full functionality." *Id.* at 4. The PSC further expressed its concern that Verizon has no policy "providing that CLECs will not be required to pay for the IOF loop until the entire

[26] Verizon's claim that OBF industry standards preclude a simultaneous, related order process for multi-speed EELs is hopelessly at odds with Verizon's assertion that it is in compliance with the final orders of the Massachusetts and Rhode Island commissions, which require exactly such ordering.

EEL has been provisioned." *Id.* The PSC therefore expressed its intention to examine the issue further in a current or future proceeding. *Id.* at 4-5, 40.

Although the decisions of these three PSCs confirm the deficiencies of the sequential-ordering process, they do not remove the need for a finding by this Commission that the sequential-ordering policy currently violates Items 2, 4, and 5 of the checklist. There is no evidence that Verizon has yet implemented the simultaneous-ordering policy ordered by the PSCs in Maryland and West Virginia. Indeed, Verizon's Application did not commit the company to implementing in West Virginia or the District of Columbia the simultaneous-ordering procedure ordered by the Maryland PSC. *See* AT&T at 34-35 n.39.[27] Although the West Virginia PSC's order was issued after Verizon filed its Application, it is far from clear whether Verizon will implement a simultaneous-ordering process in the District of Columbia, where the PSC declined to require such a procedure.[28]

Indeed, the amendment to its Model Interconnection Agreement for Maryland that Verizon has prepared regarding EELs – purportedly in compliance with the Maryland PSC's order – is further indication that Verizon has no intention of implementing an

[27] In any event, any promise by Verizon to implement a simultaneous-ordering process (whether in Maryland or in all three of the jurisdictions at issue here) is irrelevant to the issue of whether Verizon is *currently* in compliance with the competitive checklist. *See Michigan 271 Order* ¶¶ 55, 179.

[28] Although it criticized Verizon's requirement that the CLEC pay for the IOF before the loop component of the EEL had been provisioned, the D.C. PSC found that the "need for separate orders for each EEL portion arises from industry standard ordering procedures." D.C. PSC at 40. As AT&T has previously demonstrated, however, Verizon's attempt to use industry standards as a justification for the sequential-ordering process is fatally flawed, both legally and factually. *See* AT&T at 34 n.38. Verizon's implementation of a simultaneous-ordering procedure in Massachusetts and Rhode Island, and its stated commitment to implement such a process in Maryland, belies any notion that industry standards preclude it from implementing such a process throughout its region.

adequate simultaneous-ordering policy even in Maryland, much less in the other States in its region.[29] Paragraph 1 of the Amendment states that Verizon's "willingness" to enter into the Amendment is "based on a number of factors," including the Maryland PSC's order to implement a simultaneous-ordering process.[30] By using the term "willingness," rather than "agreement," and by stating that this "willingness" is based on a "number of factors" (only one of which is specified), it appears that Verizon is attempting to avoid making the simultaneous-ordering procedure available in all of the States in its region – as it would be required to do under the *Bell Atlantic – GTE Merger Order* if it simply stated in the Amendment that it had "agreed" to provide the procedure.[31]

In addition, the simultaneous-ordering procedure that Verizon offers in the Amendment is ambiguous and therefore inadequate. A truly effective simultaneous-ordering procedure would provide, without exception, that a CLEC will not be required to pay for the IOF, or any other component of the EEL, until the EEL is fully provisioned

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[29] Verizon supplied a copy of this amendment to the Commission in a recent *ex parte* filing. *See ex parte* letter from Ann D. Berkowitz to Marlene H. Dortch, dated January 22, 2003, Model Interconnection Agreement Amendment associated with orders for multi-speed EELs ("EEL Amendment").

[30] *See* EEL Amendment at 2 (paragraph 1).

[31] Under the conditions set forth in the Commission's *Bell Atlantic – GTE Merger Order*, Verizon is required to "make available to any requesting telecommunications area in the Bell Atlantic/GTE Service Area *within any Bell Atlantic/GTE State* any interconnection arrangement, UNE, or *provisions of an interconnection agreement* (including the entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions in the Bell Atlantic/GTE Service Area within *any other Bell Atlantic/GTE State*" that was "*negotiated voluntarily* by a Bell Atlantic GTE incumbent LEC, subject to state-specific pricing and performance measures." *See In re Application of GTE Corp. Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd. 14032 (2000) ("*Bell Atlantic – GTE Merger Order*"), ¶ 301 & App. D, ¶ 31a (emphasis added).

as initially ordered. The Amendment, however, states that when a CLEC orders all of the elements of the EEL simultaneously, "billing for *each* of the network elements that comprise the EEL will begin when *at least one subtending unbundled loop* has been installed and turned up."[32] Thus, under the Amendment, if (as often occurs) a CLEC orders an EEL that consists of more than one subtending loop, Verizon's language could be construed as entitling Verizon to begin billing for the IOF and *all* of the subtending loops whenever one such loop had been installed and turned up – even if the remaining loops had not been provisioned, or were never provisioned. In such circumstances, the CLEC would be required to incur stranded costs, as it does under the current sequential-ordering policy.

In short, Verizon has not implemented in Maryland or the District of Columbia a simultaneous-ordering procedure for EELs that is fully compliant with the provisions of the 1996 Act. Until it does so, it cannot reasonably be found to be in compliance with its nondiscrimination obligations under Items 2, 4, and 5 of the checklist.

[32] EEL Amendment at 2 (paragraph 1) (emphasis added).

V. THE COMMENTS ESTABLISH THAT VERIZON DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO DIRECTORY LISTINGS.

The comments also confirm that Verizon does not have adequate mechanisms in place to ensure the accurate transmittal and printing of telephone directory entries for CLECs. Because of Verizon's deficient processes, CLECs experience an unacceptably high number of inaccuracies in the directory listings of their customers. Thus, Verizon cannot be found in compliance with Item 8 of the checklist. *See, e.g.*, AT&T at 35-40; Fibernet at 46-56.

The records of the Section 271 proceedings conducted by the PSCs in Verizon's region (including the jurisdictions that are the subject of Verizon's current Application) demonstrate that Verizon is committing an unreasonably high number of errors on the directory listings of CLEC customers. *See* AT&T at 35-36. Based on the record before it, the Maryland PSC expressed concern "that directory errors, both white and yellow pages, cause disruption to CLECs disproportionately." *Maryland PSC December 16 Letter* at 8. In its comments, the West Virginia PSC finds that Verizon "has complex procedures for modifying directory listing that has led to numerous complaints from competitors," and that "the complexity of the process is inherently confusing and lends itself to errors." West Virginia PSC at 85, 130. Because of its concerns, the West Virginia PSC has concluded that further action by the PSC on the directory listing process is necessary.[33]

[33] West Virginia PSC at 85-86, 130, 139. The West Virginia PSC thus ordered its previously-established work group on directory listings to: (1) develop performance metrics that measure the accuracy of the information in Verizon's Listing Verification Report ("LVR") with that in the Local Service Request Confirmation notice ("LSRC"); (2) develop appropriate metrics for inclusion in the Carrier-to-Carrier Guidelines; (3) address whether any such metrics should be included in the "Critical Measures" in Verizon's Performance Assurance Plan; and (4) consider whether, as an alternative to the adoption of metrics, a process whereby CLECs can interface directly with Verizon Information Systems (Verizon's directory affiliate) should be established. West Virginia

The comments submitted by Fibernet provide even more evidence that Verizon's flawed processes result in numerous errors in the directory listings of CLEC customers. *See* Fibernet at 46-56. Verizon "has continually failed to include accurate listings for Fibernet's customers," and has often eliminated some Fibernet customers entirely from the directory. *Id.* at 47, 51. Fibernet "typically identifies numerous errors in the listing information provided by Verizon-WV." *Id.* at 50. Even after conducting such reviews and making other efforts to ensure that the directory listings of its customers are accurate, Fibernet found inaccuracies in *27 percent* of 4,589 listings that it submitted to Verizon in 2002. *Id.* at 51. These mistakes have injured not only Fibernet's customers but also Fibernet's reputation and ability to compete in the local exchange market. *Id.* at 47. Moreover, Fibernet continues to find *new* types of inaccuracies in its customers' directory listings. Recently, Fibernet discovered that directory listings of its customers are being transposed on a regular basis – with the customer's first and last names listed in "reverse" order. *Id.* at 51.

These errors seriously impede a CLEC's opportunity to compete in the local exchange market. "Because white pages listings cannot be changed for an entire year after a directory has been published, we recognize that errors or missing listings can have a significant impact on a carrier's service relationship with its end user customers." *Virginia 271 Order* ¶ 153. As the DOJ notes, "[I]naccuracies in directory listings caused by the regional BOC can result in substantial competitive harm" DOJ Eval. at 9.[34]

PSC at 85-86, 130-131, 139.

[34] *See also* West Virginia PSC at 85 ("While errors in any process are inevitable, the impact of a directory listing error can be devastating to a competitor or the competitor's customer").

Recent admissions by Verizon make clear that its processes are inadequate to ensure the accuracy of directory listings at *any* stage of its processes, even after the CLEC's order has been completed. Verizon concedes in its Application that it has "reconsidered" the representations that it made to the CLECs – and to this Commission in the *Virginia 271* proceeding – that the LSRC should contain all of the information the a CLEC needed to verify the accuracy of the customer's directory listing. Verizon now advises CLECs that, rather than use the LSRC, they should verify listings *after* completion of the order, using a Directory Listing Inquiry ("DLI") transaction – and then, as the "final verification step," *also* use the LVR. *See* AT&T at 37.

In short, Verizon effectively acknowledges that its processes are inadequate to ensure the accuracy of directory listings, and instead seeks to foist on the CLECs the responsibility for verifying the accuracy of their customers' directory listings. AT&T at 38-39; Fibernet at 50. Such a result is flatly contrary to Item 8 of the checklist, which clearly places that responsibility on *Verizon*.

The DOJ, citing the shift in Verizon's position since the *Virginia 271* proceeding regarding the means by which CLECs can verify the accuracy of directory listings, properly concludes that "concerns remain regarding Verizon's provision of nondiscriminatory access to white pages directory listings for CLEC customers." DOJ Eval. at 2. *See also id.* at 9-11.[35] The DOJ thus urges that in view of this recent change, and the lack of evidence regarding the effectiveness of the efforts which Verizon has purportedly made to improve the accuracy of directory listings, the Commission should

[35] As the DOJ states, Verizon's existing metric for directory listings accuracy "measures only one part of the upstream process of creating a directory listing," and does not measure accuracy "at the subsequent production phases at which CLECs are complaining about errors." DOJ Eval. at 8-9.

approve the Application *only* if it "is able to assure itself that [these] concerns . . . have been resolved." *Id.* at 2. Moreover, in weighing the credibility of Verizon's claims in the present case that its procedures provide adequate assurance of the accuracy of CLEC directory listings, the Commission should be mindful of Verizon's repudiation of similar assurance (i.e., regarding the reliability of the LSRC) to the Commission regarding this very issue in the Virginia 271 proceeding.

The comments also demonstrate that the LVR and the DLI – the procedures that Verizon now recommends that CLECs follow to verify the accuracy of directory listings – are inadequate, unreasonably burdensome, and anticompetitive. For example, the LVR does not enable a CLEC to ensure that the directory listing, as published, will be accurate, since subsequent activity by Verizon may incorrectly alter the listing. AT&T at 38-39 n.45.[36] The DLI is equally burdensome, because it can be used only one order at a time. Thus, using the DLI would be extremely time-consuming and expensive for any large-volume CLEC that sought to verify the accuracy of its customers' listings. *Id.* at 38. These costs would be in addition to the costs of reviewing the LVR, and submitting correcting orders to Verizon.

A CLEC's costs of using the DLI would be even more substantial if Verizon enforces the per-query charge in its interconnection agreements. *Id.* at 39. Notwithstanding Verizon's assertion that it does not currently collect such a charge for the DLI usage, it has not ruled out the possibility that it will do so (or even back-bill CLECs for such usage) at a future time. *Id.* Each of the PSCs in the three jurisdictions at issue has expressed concern about Verizon's ability to collect such a charge – and its

[36] Despite requests by CLECs, Verizon will not provide page proofs of the directory just before publication to enable CLECs to confirm that errors in the LVR have been corrected. Fibernet at 51.

potentially anticompetitive effect. Thus, both the Maryland and West Virginia PSCs have recently held that Verizon must obtain their approval before instituting or collecting a charge for DLI usage. *Maryland PSC December 16 Letter* at 8; West Virginia PSC at 86, 131, 137. The Maryland PSC also expressly ordered Verizon to eliminate such a charge from its model interconnection agreements in Maryland. *Maryland PSC December 16 Letter* at 8. The D.C. PSC, noting that Verizon has conceded the importance of making DLI queries available without separate charge (as an incentive to CLECs to verify the accuracy of listings), has stated its intention to conduct "further investigation" of the issue of whether Verizon "should be permitted to impose this charge." *See* D.C. PSC at 5, 51.

Verizon, however, has made no commitment in this proceeding that it will not assess a per-query charge for DLIs in all three of the jurisdictions at issue here. Instead, it has suggested only that it will remove the charge in Maryland. *See* AT&T at 40 & n. 48. Even as to Maryland, Verizon's has made no commitment that it will not attempt to cover its costs for DLI queries by including it instead as a "per-line" charge or by some other mechanism. *Id.* & n.49. Further, the DLI protocol advocated by Verizon would increase the number of preorder transactions, thereby inflating overall OSS costs to be recovered from competitors, whether that recovery is on a per-line basis or some other basis. In fact, the D.C. PSC states that in its Section 271 proceeding, Verizon asserted that it does not intend to charge for DLI queries "at this time, pending a request to change the charge basis from a per-inquiry to a per-line basis." D.C. PSC at 5.

Thus, lacking adequate processes to ensure the accuracy of directory listings, Verizon makes frequent errors in such listings and seeks to place on the CLECs the burden of detecting errors through procedures that are themselves unreliable, burdensome, and costly. In view of these facts, Verizon has not satisfied Item 8 of the checklist.

VI. PRICING ISSUES

A. Verizon's Loop Rates In The District of Columbia Violate TELRIC And Do Not Benchmark With New York.

As noted in AT&T's initial comments, Verizon's currently effective loop rates in the District of Columbia violate TELRIC and do not benchmark with Verizon's New York rates. The PSC has specifically found that those rates, which were based on the "proxy rates" established by the Commission its 1996 *Local Competition Order* and subsequently struck down by the Eighth Circuit, violate TELRIC and therefore "must be replaced . . . with permanent TELRIC-compliant rates."[37] In response to Verizon's attempt to avoid compliance with the PSC order by implementing only slightly lower rates (dubbed "New York Benchmark" rates by Verizon), the PSC ruled that "In no event is Verizon D.C. authorized to use rates established in New York, benchmarked or otherwise."[38] Hence, "there are no TELRIC-based rates in the District of Columbia." D.C. Consultative Report at 27.

Verizon nonetheless still continues to defy the PSC's orders. The company's most recent gambit has been to assert that CLECs "agree to" modify their interconnection agreements to incorporate the "New York Benchmark" rates by paying Verizon invoices incorporating those rates. Because a handful of small CLECs have "accepted" this

[37] *Formal Case No. 962, In the Matter of the Implementation of the District of Columbia Telecommunications Competition Act of 1996 and Implementation of the Telecommunications Act of 1996*, Order No. 12610 (December 6, 2002).

[38] *Formal Case No. 962, In the Matter of the District of Columbia Telecommunications Competition Act of 1996 and Implementation of the Telecommunications Act of 1996,* Order No. 12626 at ¶ 1 (January 6, 2003).

"offer," Verizon asserts that its "New York Benchmark" rates are now legal. *See* Verizon ex parte letter filed January 23, 2003.

Verizon's contortions have not made its "New York Benchmark" rates either lawful or legal. The majority of CLECs in the District have refused to consent to those rates; hence, those rates remain illegal and ineffective on their face. Even for the handful of CLECs that have "accepted" those rates, knowingly or otherwise, the rates remain unjust and unreasonable: Verizon's unilateral actions cannot nullify the express determination of the PSC that just and reasonable UNE price levels are far lower than the "New York Benchmark" rates that Verizon is trying to implement.

B. Verizon's No Build/No Facilities Policy For Provisioning Loops Precludes Any Finding That Verizon's Loop Prices In Maryland, the District of Columbia or West Virginia Comply With TELRIC Or Benchmark With New York.

AT&T showed in its initial comments that Verizon's no build/no facilities policy, discussed above, also precludes a finding that Verizon's rates comply with TELRIC or benchmark with New York rates in any of the three jurisdictions. The loop cost studies submitted by Verizon and adopted by the public service commissions in Maryland, Washington, DC, and West Virginia all contained growth and fill factors, assumptions that multiple vintages of investment would occur, and assumed expenditures for rearrangement and reconfiguration of the outside plant. The fundamental assumption underlying these inputs was that Verizon would expand its network to accommodate forecasted growth in demand. Adjusting the loop cost studies to eliminate the inputs and assumptions that contradict Verizon's no-build policy would produce a considerable reduction in loop costs. AT&T at 43-48.

The report issued yesterday by the Division of Communications of the Virginia SCC (reproduced at Attachment B, *infra*) concurs. Describing the effect of the same no-build policy in Virginia, the report finds that "Verizon's DS-1 UNE loop provisioning policy is in conflict with the implicit assumptions underlying the determination of TELRIC prices. Those assumptions included the construction of new plant and the rearrangement of existing plant." *Id*. at 27-38, 43-44.

VII. THE COMMENTS, AND VERIZON'S RECENT CONDUCT, DEMONSTRATE THAT VERIZON SHOULD BE REQUIRED TO EXPLICITLY COMMIT THAT IT WILL NOT CHALLENGE THE STATE COMMISSIONS' BASIC AUTHORITY TO ADOPT, ENFORCE, OR MODIFY VERIZON'S PERFORMANCE ASSURANCE PLANS.

The comments demonstrate that the performance assurance plans ("PAPs") approved by the state commissions in Maryland, the District of Columbia, and West Virginia do not provide an effective incentive to Verizon to comply with the competitive checklist after its Application has been approved, because Verizon has refused to agree that it will not challenge the basic (general) authority of the PSCs to modify or enforce the PAPs without Verizon's "consent." *See* AT&T at 59-62; D.C. PSC at 5-6, 91-92. As the D.C. PSC notes, Verizon's position is tantamount to an assertion that it has a "veto power" over the PAPs. D.C. PSC at 5-6.

Verizon's insistence on this "veto power" is a fundamental deficiency in its Application because, as the D.C. PSC states, PAP payments are part of the "bargain" that Verizon makes in exchange for Section 271 authority. *Id.* at 91-92. Only the existence of an effective PAP—including the subsequent modifications of the PAP pursuant to the express terms of Section K thereto—can assure the Commission that Verizon will have adequate incentive to refrain from anticompetitive conduct in the future. Thus, Verizon's argument that PAPs are voluntary commitments "carries little weight" here, because the existence of PAPs "is effectively necessary for securing Section 271 approval." *Id.* Hence, the notion that Verizon can seize upon any change to a PAP, no matter how small or ministerial, to challenge the state commission's jurisdiction to enforce or modify the PAP, is flatly inconsistent with this Commission's requirement of a self-executing metrics-and-remedies plan. *See* Massachusetts 271 Order ¶ 245 n. 767; *see generally id*., ¶ 237-247.

As the D.C. PSC recognized in expressing its concern, the possibility that Verizon will challenge the jurisdiction of the PSCs to modify the PAPs is not a theoretical concern. In New Jersey, Verizon filed a court action last June challenging the authority of the New Jersey Board of Public Utilities to modify the PAP – only three months after the Commission approved Verizon's application for Section 271 authority for that State. AT&T at 60-61 & n.92.

Only last week, Verizon filed a "petition for clarification" with the West Virginia PSC that would have the effect of modifying – and reducing – its obligations under the PAP in that State.[39] Verizon, for example, requests that the West Virginia PSC limit its obligation to file corrected performance reports to those instances where there is a "material error" – which Verizon defines as an error that increases the PAP remedies for any CLEC by more than $1,000, or decreases Verizon's liability under the PAP by more than $10,000.[40] Because the monthly reports are used as the basis for determining the payments made by Verizon under the PAP, Verizon's proposed "modification" would

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[39] *See* Petition for Clarification of Verizon West Virginia Inc., filed January 21, 2003 in West Virginia PSC Case No. 02-0809-T-P (attached hereto as Attachment A).

[40] *Id.* at 4-5.

effectively relieve it of any additional liability due to errors in its data as long as the error resulted in an understatement of a payment to a CLEC by less than $1,000.

Verizon's proposed "modification" is highly significant, for at least four reasons. First, it would reduce Verizon's incentive to comply with Section 271 in the future. In addition to relieving Verizon of some of its current financial obligations under the PAP, Verizon's proposal that it be required to file corrected data only for "material error" (as defined by Verizon) would dilute the incentive created by active oversight of accurate metrics reports by the PSCs and the CLECs.

Second, Verizon's current proposal is inconsistent with its claim that the Commission can rely on the accuracy of its metrics reports. Verizon cannot simultaneously argue that correcting its metric reports is overly burdensome while representing to this Commission that its reports are highly accurate. This Commission and the CLECs are entitled to "reasonable assurances that the reported data are accurate." Massachusetts 271 Order at n. 767. Under Verizon's proposal in West Virginia, there would be no assurance of the accuracy of metrics which do not trigger remedial payments, because satisfying Verizon's $1,000/$10,000 "materiality" criterion would be impossible.[41] Massachusetts 271 Order ¶ 237. In New Jersey, Verizon filed over 350 changes during the year 2002 that required recalculation of metrics. Daily recalculation of this kind can hardly be characterized as *de minimis* or immaterial.

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[41] The PAP's metrics calculations are complex. They involve both CLEC aggregate data and CLEC specific data, and the analysis necesssarily spans up to three months (e.g. to consider the effect of "-1" scores. For example, it is far from straightforward to determine whether a single error will trigger a change in payments, whether two errors separately determined to be immaterial would be material in combination, whether the dollar thresholds apply separately to each CLEC are aggregate for all CLECs, and so forth. Verizon's belated attempt to renege on its consensus support for the PAP and metrics in West Virginia is alone ground for rejection of the 271 application.

Third, based on its past conduct in New Jersey, Verizon's "petition for modification" on the immediate heels of 271 approval is only the beginning of an attempt to dilute the effectiveness of the PAP – and to challenge any modifications to the PAP that strengthen or enforce it. Although Verizon previously had ample opportunity to raise with the West Virginia PSC the issue of whether its obligation to restate data should be limited to "material errors," Verizon did not do so until last week—*after* the West Virginia PSC had issued its Consultative Report. Indeed, Verizon itself proposed the PAP in West Virginia to the PSC as a consensus filing with AT&T, and touted the benefits of the PAP in its Application to this Commission. *See* Application at 104-106. This was precisely Verizon's pattern of conduct in New Jersey, where it cited its PAP in that State in support of its Section 271 Application – and then challenged in the New Jersey courts the authority of the New Jersey BPU to modify the PAP to include the requirement that Verizon restate data originally reported in error, regardless of its "materiality."[42] Given the frequency and magnitude of errors subsequently revealed by the New Jersey requirement, Verizon's motives for suppressing data on similar inaccuracies in other states is obvious. Clearly Verizon intends to agree to modifications to the PAP only when they are to its liking (because they weaken the PAP), and to challenge those modifications with which it disagrees (because they strengthen the PAP).

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[42] *See, e.g.,* Superior Court of New Jersey, Appellate Division, Docket No. A-576-02-T2, Brief on Behalf of Verizon New Jersey Inc. in Support of Its Motion for A Stay, filed September 27, 2002, at 1, 7, 15-34. Verizon, for example, attacked the BPU's requirement that it pay a fine if it failed to file corrected data within a certain time period, because Verizon could be required to pay the fine even if the monthly report "contains no material error" and the erroneous information had "no bearing on the Board's ability to fully evaluate Verizon NJ's performance." *Id.* at 1, 12. The BPU's decision to impose a restatement obligation on Verizon, and to assess fines for failure to restate erroneously reported obligation, was a modification to the original New Jersey PAP, which contained no provision regarding restatement of data. *Id.* at 8-9.

In such circumstances, the PAPs in the three jurisdictions cannot be deemed to be effective, and the Commission therefore cannot reasonably find that approval of the Application is consistent with the public interest, convenience, and necessity.[43]

[43] Plainly recognizing that its proposed "clarification" would reduce the effectiveness of the West Virginia PAP, Verizon rationalized to the West Virginia PSC that the "clarification" would not affect its Application to this Commission "because the FCC has never found that a refilling requirement is necessary for purposes of 271 approval or otherwise." Petition for Clarification, *supra*, at 1.

CONCLUSION

For the foregoing reasons, Verizon's application for authorization to provide in-region, interLATA services in Maryland, Washington, DC, and West Virginia should be denied.

Respectfully submitted,

/s/ Mark C. Rosenblum

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark C. Rosenblum
Lawrence J. Lafaro
James J.R. Talbot
AT&T CORP.
Room 3A229
900 Rt. 202/206 North
Bedminster, NJ 07921
(908) 532-1847

David M. Levy
Richard E. Young
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

January 31, 2003

<u>**CERTIFICATE OF SERVICE**</u>

The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served, by the noted methods, the 31th day of January, 2003, on the following:

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
By Electronic Filing

Janice Myles
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-C327
Washington, D.C. 20554
By Hand

Donald Laub, Director
Telecommunications Division
Maryland Public Service Commission
William Donald Schaeffer Tower
6 Paul St., 19th Floor
Baltimore, MD 21202
dlaub@psc.state.md.us
By Email

Sanford M. Speight, Acting Secretary
Public Service Commission of the District of Columbia
1333 H Street., NW
West Tower, 2nd Floor
Washington, DC 20005
sspeight@dcpsc.org
By Email

Rick Hitt, General Counsel
West Virginia Public Service Commission
P.O. Box 812
Charleston, WV 25323
rhitt@psc.state.wv.us
By Email

Jackson Nichols
U.S. Department of Justice
Antitrust Division
Telecommunications and Media Enforcement Division
1401 H. Street, N.W., Suite 8000
Washington, DC 20530
jackson.nichols@usdoj.gov
By Email

Benjamin Brown
U.S. Department of Justice
Antitrust Division
Telecommunications and Media Enforcement Division
1401 H Street, N.W., Suite 8000
Washington, DC 20530
By Hand

Gary Remondino
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-C143
Washington, D.C. 20554
By Hand

Susan Wittenberg
U.S. Department of Justice
Antitrust Division
Telecommunications and Media Enforcement Division
1401 H Street, N.W., Suite 8000
Washington, DC 20530
By Hand

Qualex Internationals
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
By Hand

/s/Patricia A. Bunyasi

Patricia A. Bunyasi